IN THE FIJI COURT OF APPEAL
Civil Jurisdiction

Civil Appeal No. 12 of 1982

Between: FERO TABAKISUVA Appellant

and

1. SANT KUMAR
2. ERONI TOKAILAGI Respondents

R.I. Kapadia for the Appellant
Ms. A. Prasad for the first Respondent
No Appearance for the second Respondent

Date of Hearing: 28 July, 1982
Date of Judgment: 30 July, 1982.

JUDGMENT OF THE COURT

Marsack, J.A.

This is an appeal against the judgment of the Supreme Court entered at Suva on 27 January, 1982 awarding damages to the appellant as administrator of the estate of Semi Matalau, against the second respondent in the sum of $5,400 in respect of a motor collision which took place on 1 January, 1978 on Grantham Road, Suva and resulted in the death of Semi Matalau who was a passenger in the car driven by the second respondent. The claim against the first respondent was dismissed.

The relevant facts may be shortly set out. Shortly before 10.00 p.m. on 1 January, 1978, a truck, which had been driven by the first respondent, though it was not his property, was parked on Grantham Road, Suva, which is a very wide tar-sealed thoroughfare. A car owned and driven by the second respondent, and containing four passengers, was being driven down Grantham Road on the same side as

the parked truck. Street lights were shining on the other side of the road. Another vehicle was overtaking the second respondent's car and the second respondent swerved to the left and collided with the parked truck. The impact of the collision was such that the back of the truck was pushed on to the footpath and the vehicle was so extensively damaged that it could not be repaired. The damage to the car was also serious as it resulted in the death of the passenger sitting beside the driver.

In his judgment the learned trial Judge held that negligence of the second respondent was wholly and solely responsible for the death of Semi Matalau and that there was no negligence on the part of the first respondent.

Twelve grounds of appeal were set out at length in the Notice of Appeal. We do not find it necessary to quote them verbatim. Summarised, they amount to a contention that the learned trial Judge was in error in holding that the first respondent was in no sense liable for the collision, in that: the admitted absence of rear red reflectors on the truck did cause or materially contribute to the accident; and further, first respondent had created a danger by parking an insufficiently lighted heavy goods vehicle on a rainy night upon a main highway subject to heavy traffic.

In the course of his argument on the subject of leaving an insufficiently lighted vehicle in a dangerous position on a main street, counsel for the appellant criticised some of the findings of fact by the learned trial Judge regarding the lighting of the truck. Counsel referred to the evidence not only of the appellant but also of the witness Rusiate. In the course of his judgment the learned Judge said:

> "The first defendant whose story I accept said .... that he put off his lights but left his park lights on. The first defendant impressed me as being an honest witness."

He further referred to Rusiate as

> "too unreliable a witness in any event to accept as a witness to establish the alleged fact that the truck showed no lights at the time of the accident. All I can accept, as he was on the scene, is that he did not notice any lights on the truck."

As to the appellant the learned Judge said:

> "The second defendant also alleged that the truck displayed no lights. I do not accept his evidence on this issue.
>
> The second defendant also admitted that he had had "quite a fair bit to drink that night.""

As far as this appeal is concerned, this Court must accept the findings of fact made by the learned trial Judge, and in particular that at the time the collision occurred the parking lights were definitely showing on the first respondent's truck, though there were no red reflectors at the rear of the vehicle. That being so, we shall confine our attention to the legal issues involved in the argument for the appellant, in so far as they concern the facts as found.

In the original proceeding before the Supreme Court three grounds were pleaded in the Statement of Claim; Negligence, Breach of statutory duty, and Nuisance. The first two can conveniently be discussed together. In either case it must be proved that the defendant was in breach of a duty; and that the plaintiff was a person to whom the duty was owed.

As to Negligence, the duty is that one should exercise reasonable care in one's actions, so as not to injure others. The test is whether the challenged conduct is reasonable, judged by the standard of the behaviour of the ordinary responsible citizen. Given proof of lack of reasonable care, then the duty is owed to anyone who could be considered as likely to be injured; the person who is so closely and directly

affected by the act that he ought reasonably to be in the contemplation of the careless person: Donoghue v. Stevenson (1932) AC 562 at 580. So in negligence the test of duty is a question of assessment of standard of care, but the class of possible claimants is wide.

As to statutory duty, the test of breach of duty is much stricter. It is not gauged by what a reasonable man would or would not have done; the statute or the regulation defines the required standard of conduct. What has to be determined is only whether the act complained of transgresses the provisions of the statute. Even then, no cause of action arises unless the plaintiff is among the class of persons whom the statute is designed to protect. In special classes of statutory duty, such as those created by legislation governing factories, or mines or similar places where regulations have been passed to require safety standards to be observed, it is not difficult to conclude that the worker is the person designed to be protected, and therefore he is the person to whom the duty is owed.

But difficulties have emerged in highway cases, for there is no restricted class of persons who may encounter danger upon the road. Everyone is free to use the highways. Governmental agencies impose a multitude of regulations as to how vehicles shall be equipped and how they shall be driven.

But it does not follow that anyone injured, when a driver has broken a Traffic Regulation, will necessarily be entitled to claim damages against that driver in respect of the injuries sustained.

Cases relating to the highway situation were discussed by the learned Judge and counsel for appellant has carefully explored an even greater number. No single answer governing every situation can be

predicated for the statutory provisions vary so widely. But the principle can be well understood by considering three leading cases:- London Passenger Transport Board v. Upson (1949) A.C. 155, Clarke v. Brims (1947) K.B. 497, Coote & Anor v. Stone (1971) 1 WLR 279.

In Upson's case, statutory duty was held to be owed by a vehicle driver to a member of the public - but because she was within the class of persons that the particular Traffic Regulation contemplated. She was a pedestrian on a crossing and the driver's breach was of the regulation defining the duty of a driver approaching. That duty could be owed only to a defined and identifiable class of persons, and assistance can be gained from observations by Lord Wright at page 168 on the difference between negligence and breach of statutory duty.

The next case of importance in relation to Mr. Kapadia's submission, is Clarke et ux v. Brims. A driver parked a vehicle without rear lights and was in breach of the appropriate vehicle lighting regulations. Morris J. (as he then was) held that the regulations imposed "public duties only", and breach would not, without more, sustain an action at the suit of the individual road user who collided with the stationary vehicle. The long established authority of Phillips v. Britannia Hygienic Laundry Co. Ltd. (1923) 2 KB 832 was relied on.

At first glance it is not easy to reconcile the two authorities, where in one case it was held that a duty was owed to a pedestrian by a driver approaching a crossing, but not by a driver of an unlit vehicle to another approaching from the rear. We think that the distinction and the present position of the law is explained in the third case - Coote v. Stone where it is pointed out that to hold that the duty is owed to the public at large in road accident cases is to impose absolute liability, once a regulation has been breached. In factories and similar places that is acceptable. The high risk demands high vigilance. Similarly in especially

dangerous situations such as the pedestrian crossing case. But in the case of the defective or non-conforming vehicle the imposition of absolute liability has been thought to be too harsh. As Morris J. said, breach of duty may be persuasive evidence of negligence, but in a case such as he was considering the sudden and non-negligent failure of rear lights was only to be considered on an evidential basis.

It becomes a matter of some nice decision, for as road traffic increases and highways become more populated it may be thought difficult to draw the line in a given case. The present state of the law however, is that Clarke v. Brims has continued to be approved by high authority and the facts of this case do not require or justify any firm commitment by this Court on the point except to repeat the principle - whether a person in breach owes a statutory duty to a claimant depends on whether that person is one of a class that the statutory provision aimed to protect. Kermode J., relying on that principle, and on the authority of Coote v. Stone, accepted that the breach in respect of rear reflectors did not give rise to liability under a plea of breach of statutory duty, nor on the facts was the driver in his view negligent.

The matter, though of considerable interest to lawyers, is however academic in the present case, but we are obliged to Mr. Kapadia for his careful argument. The learned Judge said that even in the absence of reflectors (which he found) or absence of tail light (which he did not find) he was not satisfied that any fault on the part of the first respondent caused or materially contributed to the accident.

We return to these findings. Under Reg. 63 of the Traffic Regulations 1974 every vehicle when stationary at night on any road shall have alight two side lamps and two rear lamps; and 63(4) provides that any vehicle stationary on the road at night, without having the lamps illuminated as required by the Regulations, shall

have at the back of the vehicle two red reflectors with an unbroken surface of not less than 3 square inches.

The learned Judge analysed the facts and concluded from evidence which he accepted that second respondent's look-out was so defective, his driving ability was so affected by liquor, and his speed was so great that even a fully complying vehicle would not have been seen and avoided by him.

The learned Judge relied on the observation in Bonnington Castings Ltd. v. Wardlaw (1956) A.C. 613 that a plaintiff must not only prove breach of duty but also that it was a material factor contributing to the accident. On his factual findings there is no reason to quarrel with his conclusion that any fault on the part of first respondent was not causative, and we see no reason to disturb this finding.

The other ground pleaded was Nuisance. This can be dealt with quite shortly, and again on a factual basis.

Nuisance is the condition which arises when the rights of an individual to user of land has been unduly interfered with. In highway cases it arises inter alia where obstructions are unjustifiably placed in the roadway, thereby impeding ordinary user of the road. Overhanging structures, ditches, road blocks are sometimes involved. Mr. Kapadia endeavoured to elevate the first respondent's parked vehicle to this position, and he relied on the case of Ware v. Garston Haulage Co. 1944 1 KB 30 as purported authority for the proposition which he advanced, namely that a stationary vehicle which impedes the right of way on any part of a road automatically becomes a nuisance, and proof of collision with it dispenses with any need to prove negligence.

The erroneous nature of this proposition is demonstrated by the analysis of that case in the judgment of the Court of Appeal in Maitland v. Raisbeck (1944) 1 KB 689, where it was held that all the circumstances

surrounding the creation and duration of the block in the road must be considered, and the mere existence of such a block is not ipso facto a nuisance.

Vehicles may legitimately stop in the roadway for many purposes. This vehicle was pulled into the left-hand side of the road and brought to a standstill - a common occurrence - and it had been there for the shortest possible time to enable the driver to perform a lawful purpose. There is nothing in these facts to prove the existence of a nuisance, and the trial Judge in our view was correct in refusing to accept this submission.

For these reasons we hold that the judgment of the learned Judge was correct, and the appeal is accordingly dismissed, with costs against the appellant.

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Vice-President

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Judge of Appeal

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Judge of Appeal